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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA-446]

Schedules of Controlled Substances: Extension of Temporary Placement of 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA in Schedule I of the Controlled Substances Act

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Temporary rule; temporary scheduling order; extension.

SUMMARY: The Acting Administrator of the Drug Enforcement Administration is issuing this temporary scheduling order to extend the temporary schedule I status of six synthetic cannabinoids (SC). The substances are: methyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate [5F-ADB; 5F-MDMB-PINACA]; methyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3-methylbutanoate [5F-AMB]; *N*-(adamantan-1-yl)-1-(5-fluoropentyl)-1*H*-indazole-3-carboxamide [5F-APINACA, 5F-AKB48]; *N*-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamide [ADB-FUBINACA]; methyl 2-(1-(cyclohexylmethyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate [MDMB-CHMICA, MMB-CHMINACA] and methyl 2-(1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate [MDMB-FUBINACA], including their optical, positional and geometric isomers, salts, and salts of isomers. The schedule I status of 5F-ADB, 5F-AMB, 5F-APINACA, ADB-

FUBINACA, MDMB-CHMICA and MDMB-FUBINACA will expire on April 10, 2019.

This temporary order will extend the temporary scheduling of 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA for one year or until the permanent scheduling action for these six substances is completed, whichever occurs first.

DATES: This temporary scheduling order, which extends the order (82 FR 17119, April 10, 2017), is effective April 10, 2019 and expires on April 10, 2020. If DEA publishes a final rule making this scheduling action permanent, this order will expire on the effective date of that rule, if the effective date is earlier than April 10, 2020.

FOR FURTHER INFORMATION CONTACT: Lynnette M. Wingert, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, Virginia 22152; Telephone: (202) 598-6812.

SUPPLEMENTARY INFORMATION:

Background and Legal Authority

On April 10, 2017, the Acting Administrator of the Drug Enforcement Administration (DEA) published an order in the *Federal Register* (82 FR 17119) temporarily placing methyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3,3-dimethylbutanoate [5F-ADB; 5F-MDMB-PINACA], methyl 2-(1-(5-fluoropentyl)-1*H*-indazole-3-carboxamido)-3-methylbutanoate [5F-AMB], *N*-(adamantan-1-yl)-1-(5-fluoropentyl)-1*H*-indazole-3-carboxamide [5F-APINACA, 5F-AKB48], *N*-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1*H*-indazole-3-carboxamide [ADB-FUBINACA], methyl 2-(1-(cyclohexylmethyl)-1*H*-indole-3-carboxamido)-3,3-dimethylbutanoate [MDMB-CHMICA, MMB-CHMINACA] and methyl 2-(1-(4-fluorobenzyl)-1*H*-indazole-3-

carboxamido)-3,3-dimethylbutanoate [MDMB-FUBINACA], synthetic cannabinoid (SC) substances, in schedule I of the Controlled Substances Act (CSA) pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). That order was effective on the date of publication, and was based on findings by the Acting Administrator of the DEA that the temporary scheduling of these SCs was necessary to avoid an imminent hazard to the public safety pursuant to 21 U.S.C. 811(h)(1). Section 201(h)(2) of the CSA, 21 U.S.C. 811(h)(2), requires that the temporary control of these substances expires two years from the effective date of the scheduling order, or on April 10, 2019. However, the CSA also provides that during the pendency of proceedings under 21 U.S.C. 811(a)(1) with respect to the substance, the temporary scheduling¹ of that substance could be extended for up to one year. Proceedings for the scheduling of a substance under 21 U.S.C. 811(a) may be initiated by the Attorney General (delegated to the Administrator of the DEA pursuant to 28 CFR 0.100) on his own motion, at the request of the Secretary of Health and Human Services (HHS),² or on the petition of any interested party.

The Acting Administrator of the DEA (Acting Administrator), on his own motion pursuant to 21 U.S.C. 811(a), has initiated proceedings under 21 U.S.C. 811(a)(1) to permanently schedule 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA. The DEA has gathered and reviewed the available information regarding the pharmacology, chemistry, trafficking, actual abuse, pattern of abuse, and the relative potential for abuse for these six SCs. On September 27, 2017, the DEA submitted a request to the HHS to provide the DEA with a scientific and medical

¹ Though DEA has used the term “final order” with respect to temporary scheduling orders in the past, this notice adheres to the statutory language of 21 U.S.C. 811(h), which refers to a “temporary scheduling order.” No substantive change is intended.

² The Secretary of HHS has delegated to the Assistant Secretary for Health of the HHS the authority to make domestic drug scheduling recommendations.

evaluation of available information and a scheduling recommendation for 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA, and in accordance with 21 U.S.C. 811 (b) and (c). Upon evaluating the scientific and medical evidence, on March 21, 2019, the HHS submitted to the Acting Administrator its scientific and medical evaluation for these six substances. Upon receipt of the scientific and medical evaluation and scheduling recommendations from the HHS, the DEA reviewed the documents and all other relevant data, and conducted its own eight-factor analysis of the abuse potential of 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA in accordance with 21 U.S.C. 811(c). The DEA published a notice of proposed rulemaking for the placement of 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA in schedule I elsewhere in this issue of the *Federal Register*. If the scheduling of these substances is made permanent, the DEA will publish a final rule in the *Federal Register*.

Pursuant to 21 U.S.C. 811(h)(2), the Acting Administrator orders that the temporary scheduling of 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA, including their optical, positional and geometric isomers, salts, and salts of isomers, be extended for one year, or until the permanent scheduling proceeding is completed, whichever occurs first.

In accordance with this temporary scheduling order, the schedule I requirements for handling 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA, including their optical, positional and geometric isomers, salts, and salts of isomers, will remain in effect for one year, or until the permanent scheduling proceeding is completed, whichever occurs first.

Regulatory Matters

The CSA provides for an expedited temporary scheduling action where such action is necessary to avoid an imminent hazard to the public safety. 21 U.S.C. 811(h). The Attorney General may, by order, schedule a substance in schedule I on a temporary basis. *Id.* 21 U.S.C. 811(h) also provides that the temporary scheduling of a substance shall expire at the end of two years from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings to permanently schedule the substance, extend the temporary scheduling for up to one year.

To the extent that 21 U.S.C. 811(h) directs that temporary scheduling actions be issued by order and sets forth the procedures by which such orders are to be issued and extended, the DEA believes that the notice and comment requirements of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, do not apply to this extension of the temporary scheduling action. The specific language chosen by Congress indicates an intention for the DEA to proceed through the issuance of an order instead of proceeding by rulemaking. Given that Congress specifically requires the Attorney General to follow rulemaking procedures for other kinds of scheduling actions, see section 201(a) of the CSA, 21 U.S.C. 811(a), it is noteworthy that, in section 201(h), Congress authorized the issuance of temporary scheduling actions by order rather than by rule. In the alternative, even assuming that this action might be subject to section 553 of the APA, the Acting Administrator finds that there is good cause to forgo the notice and comment and the delayed effective date requirements of section 553, as any further delays in the process for extending the temporary scheduling order would be impracticable and contrary to the public interest in view of the manifest urgency to avoid an imminent hazard to the public

safety. Further, the DEA believes that this order extending the temporary scheduling action is not a “rule” as defined by 5 U.S.C. 601(2), and, accordingly, is not subject to the requirements of the Regulatory Flexibility Act (RFA). The requirements for the preparation of an initial regulatory flexibility analysis in 5 U.S.C. 603(a) are not applicable where, as here, the DEA is not required by section 553 of the APA or any other law to publish a general notice of proposed rulemaking.

Additionally, this action is not a significant regulatory action as defined by Executive Order 12866 (Regulatory Planning and Review), section 3(f), and, accordingly, this action has not been reviewed by the Office of Management and Budget (OMB).

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Federalism) it is determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

As noted above, this action is an order, not a rule. Accordingly, the Congressional Review Act (CRA) is inapplicable, as it applies only to rules. 5 U.S.C. 808(2). It is in the public interest to maintain the temporary placement of 5F-ADB, 5F-AMB, 5F-APINACA, ADB-FUBINACA, MDMB-CHMICA and MDMB-FUBINACA in schedule I because they pose a public health risk. The temporary scheduling action was taken pursuant to 21 U.S.C. 811(h), which is specifically designed to enable the DEA to act in an expeditious manner to avoid an imminent hazard to the public safety. Under 21 U.S.C. 811(h), temporary scheduling orders are not subject to notice and comment rulemaking procedures. The DEA understands that the CSA frames temporary

scheduling actions as orders rather than rules to ensure that the process moves swiftly, and this extension of the temporary scheduling order continues to serve that purpose. For the same reasons that underlie 21 U.S.C. 811(h), that is, the need to place these substances in schedule I because they pose an imminent hazard to public safety, it would be contrary to the public interest to delay implementation of this extension of the temporary scheduling order. Therefore, in accordance with section 808(2) of the CRA, this order extending the temporary scheduling order shall take effect immediately upon its publication. The DEA has submitted a copy of this order to both Houses of Congress and to the Comptroller General, although such filing is not required under the Congressional Review Act, 5 U.S.C. 801–808 because, as noted above, this action is an order, not a rule.

Dated: April 2, 2019

Uttam Dhillon

Acting Administrator

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